King County

December 12, 2008

Kevin C. Fitzpatrick
Water Quality Section Manager
Washington State Department of Ecology
Northwest Regional Office
3190 – 160th Avenue SE
Bellevue, WA 98008-5452

RE: Notice of Violation (NOV) No. 6180

Dear Mr. Fitzpatrick:

On November 14, 2008, King County (the County) and the City of Tukwila (the City) received your letter dated November 13, 2008, with NOV No. 6180 attached. This letter constitutes our formal response.

The subject of the NOV is a 24-inch storm drain pipe (the Pipe) that runs along the northern edge of the Jorgensen Forge property between East Marginal Way and the Duwamish River. High levels of PCBs have been found in sediment samples taken from the bottom of the Pipe, the highest levels by far being at Stormdrain Manhole (SDMH) 24A[1], just downgradient of a currently plugged 12-inch lateral connecting into the Pipe from the Jorgensen property to the south. The NOV seems to be based on the supposition that ongoing PCB contamination in the Duwamish is associated with stormwater runoff from East Marginal Way and the King County International Airport (the airport) flowing through the PCBs in the Pipe[2]. It also appears that the Washington State Department of Ecology (Ecology) has issued the NOV to the County and the City under the theory that because the Pipe is "an integral component of [the municipal] storm drainage system," the municipalities operate it and "are responsible for its operation and maintenance." Ecology further states that "[w]e have the technology and opportunity to remove most if not all of these PCB-contaminated sediments before they migrate into the river." So, it appears that the outcome Ecology seeks is at the very least for the County and City to clean the pipe.

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[1] *See* Washington State Department of Ecology, Lower Duwamish Waterway Source Control Action Plan for Early Action Area 4, December 2007, Figure 24 (enclosed).

[2] The NOV is actually rather vague with respect to what County and City actions are the basis of the actual violation, what the actual violation is, and what actual steps Ecology believes needs to be taken. Our response addresses what we interpret the NOV to mean.

First, we do not agree with the statement that the County and City are the operators of a privately owned pipe just because it conveys water away from the municipal storm sewer system. Neither the County nor the City own the Pipe or the land in which it lies. Additionally, neither the County nor the City own an easement for the operation or maintenance of the Pipe, which is in the jurisdictional and geographical boundaries, and therefore under the regulation of, the City. The Tukwila Municipal Code, at Section 4.30.090 (A)(3) clarifies that "[m]aintenance of private facilities"…[is] "the responsibility of the facility owner." With respect to the County, King County Code 9.04.155 and .120 both state unambiguously that the County is not responsible for the maintenance of any drainage facilities that have not been accepted for maintenance. Under the law of both the City and the County, the maintenance of a facility that is privately owned on private land is the responsibility of the private owner.

The County and City regulations are consistent with the common law of drainage in Washington state (see enclosed memorandum) in which a downstream property owner is responsible for maintaining the viability on his property of any portion of a natural drainage system, even one that has been piped.

Ecology's effort to rely on RCW 90.48.080 to effectuate a public cleanup of a polluted private pipe is contrary to both local regulation and state drainage law. If the public, through the agency of the County or City, were responsible for the pollution in the pipe, a case could be made for finding a way to make the cleanup a public responsibility. However, in this case, all available data indicate that the source of the pollution was most likely a direct release to SDMH 24A, as the level of PCBs found there, at 10 million µg/kg for Aroclor 1254, is far higher than the next highest levels found in the Pipe, at around 2.5 million µg/kg, also for Aroclor 1254, in the two private manholes upgradient.[3] These are in turn far higher than the level of contamination in the soils above the pipe[4]. Even the distribution of PCBs in the Pipe strongly suggests that the PCBs are spreading upgradient from the point of highest contamination *toward* the municipal systems, not from them. This distribution indicates that the initial PCB contamination is affected by the tide, which twice daily fills the Pipe, and can be shown to produce significantly more flow in the Pipe than the municipal stormwater discharges[5]. Even if the municipal discharges were permanently diverted to another outfall, so they no longer discharged through an area of known contamination, the Pipe's PCB load would continue to be a problematic source for the Duwamish because the tide is such a significant factor in the distribution of PCBs through the Pipe.

Both the County and the City are committed to ensuring that any discharges of PCBs from our systems into the Pipe are controlled to the maximum extent practicable. We are working together to address any issues related to PCB contamination in our stormwater discharges to the

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[3] *See ibid.*

[4] *See* Floyd Snider, Phase II Transformer PCB Investigation Report Prepared for the Boeing Company, Seattle, Washington, August 3, 2005, Figure 3.8 (enclosed).

[5] *See* PBS Engineering and Environmental, PCB Source Control Investigation of the City of Tukwila Stormwater System, Jorgensen Pipe Discharge Area, October 2008, page 8.

Pipe. As previously disclosed to Ecology, the City hired PBS Engineering & Environmental to prepare a report (enclosed and incorporated by reference into this response) investigating PCB sources into the part of its municipal system associated with East Marginal Way that discharges to the Pipe. The County is preparing a similar report for the portion of its system at the airport that discharges to the Pipe. However, recent tests of the City's catch basins draining to the Pipe show either no detectable PCBs, or very low levels[6]. The only catch basin in the County system draining to the Pipe with levels above Washington State sediment standards for PCBs is that closest to the Pipe (CB-584), which is likely tidally influenced and contaminated from downgradient, as the PCB levels at that location are considerably higher, and inconsistent with, the PCB levels in catch basins further upgradient at the airport[7].

We understand that the stretch of the Duwamish River adjacent to the Jorgensen property is slated for a cleanup under CERCLA (The Comprehensive Environmental Response, Compensation, and Liability Act) because of PCB contamination. We also understand that this cleanup will not move forward until the potential sources of PCB contamination from the upland areas are removed. We can understand Ecology's desire to move the source removal process forward so that the Duwamish cleanup may proceed at a timely and efficient pace. However, to accomplish that purpose, Ecology should consider selecting a more direct remedy for resolving the problem of PCB pollution in the Pipe, one that is consistent with property law, drainage law, and with essential fairness—have the property and Pipe owner clean up the source of the contamination.

As we understand it, Ecology has an agreed order in place under the Model Toxics Control Act (MTCA) to address upland PCB sources at the Jorgensen site. As the Pipe and its PCB load are within the area addressed by the order, using the MTCA process to clean up the Pipe is the proper tool and makes sense. When the Pipe cleanup is integrated into the MTCA process, the timing of the cleanup can be phased to most efficiently deploy resources. The County and City will cooperate with the cleanup by temporarily blocking or diverting their stormwater discharges should that be necessary.

Finally, as alluded to above, the County notes that it does not have regulatory jurisdiction or enforcement power over the Pipe, nor does the County or the City have a legal right to access the Pipe over private property. Neither the County nor the City should be expected to remedy a source of contamination that they did not create and have no control over. Such a remedy would result in the use of scarce public resources and funds for a cleanup that is essentially a private responsibility. To use public funds for a private cleanup is, in our view, neither warranted nor legitimate under the circumstances and data as we understand them.

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[6] *See ibid, p. 7.*
[7] *See ibid,* pp. 4 and 7.

Please contact Curt Crawford of King County at 206-296-8329 or Ryan Larson of the City of Tukwila at 206-431-2456 if you have further questions or need more information.

Sincerely,

Robert Burke
Division Director
King County Department of Transportation
King County International Airport

Jim Morrow, P.E.
Director, Public Works
City of Tukwila

RB:JM:bgD51

Enclosures

cc: Margaret J. King, Kenyon Disend PLLC, The Municipal Law Firm
Ryan Larson, Senior Surface Water Engineer, City of Tukwila
Joanna Richey, Assistant Division Director, Water and Land Resources Division (WLRD), Department of Natural Resources and Parks (DNRP)
Curt Crawford, Manager, Stormwater Services Section, WLRD, DNRP

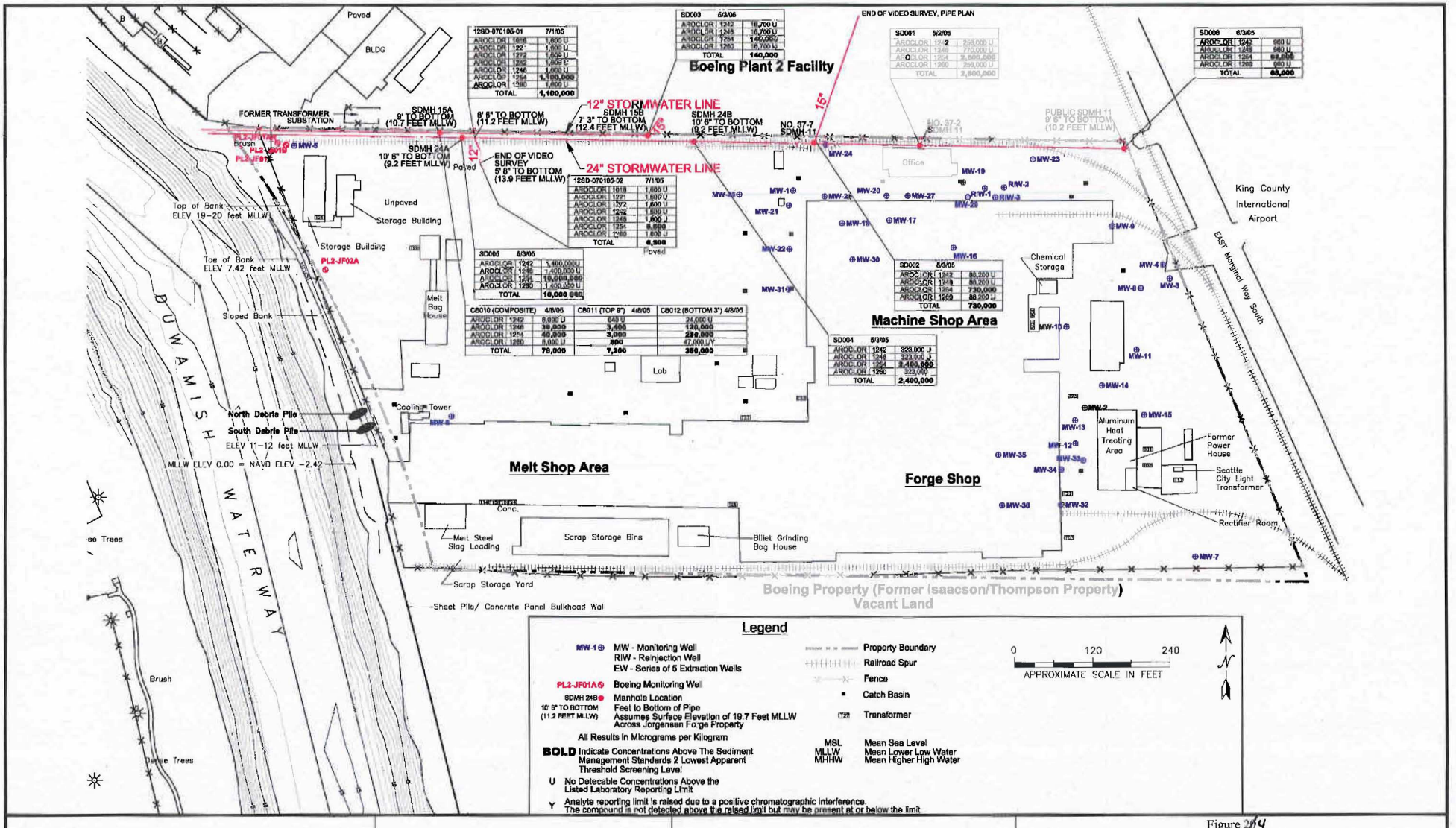
List of Enclosures
By Order of Reference in Letter

1. Figure 24 – Jorgensen Forge Facility, Jorgensen Forge Facility – Boeing Plant 2 Facility, Property Line Stormwater Lines

2. Memorandum regarding Drainage Law Issue from Joseph B. Rochelle, Senior Deputy Prosecuting Attorney

3. Figure 3.8 – Subsurface PCB Distribution along Storm Pipe Alignments

4. PCB Source Control Investigation of the City of Tukwila Stormwater System



ecology and environment, inc.
International Specialists in the Environment
Seattle, Washington

Base Map Reference: Earle M. Jorgensen Company 2005.

LOWER DUWAMISH WATERWAY
EARLY ACTION AREA 4
Seattle/Tukwila, Washington

Figure 2-4
JORGENSEN FORGE FACILITY
JORGENSEN FORGE FACILITY - BOEING PLANT 2 FACILITY
PROPERTY LINE STORMWATER LINES

Date:	Drawn by:	
4/5/07	AES	10:002330WD0702\fig 2-4

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY

King County

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CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015
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7 November 2008

MEMORANDUM

TO: Joanna Richey, Assistant Division Director, Water and Land Resources Division

FROM: Joseph B. Rochelle, Senior Deputy Prosecuting Attorney

SUBJECT: Drainage Law Issue

Issue Presented: King County's municipal stormwater system collects stormwater according to a natural drainage pattern and conveys that water through a pipe into another jurisdiction's system, which in turn conveys the original water plus that jurisdiction's water into a pipe that is owned by a private property owner in the second jurisdiction. The water is then discharged out of the private pipe into waters of the state. The interconnected drainage system reflects natural drainage patterns. If the private pipe requires repair to remain functioning, does King County have authority to require the repair?

Answer: In terms of regulatory authority, King County's regulatory stormwater authority is co-extensive with its jurisdictional boundaries; so from a purely regulatory standpoint, it could not force the repair on property, whether public or private, that is within the stormwater jurisdiction of another government. If the private pipe were in an area within unincorporated King County, where King County does have stormwater regulatory authority, a case could be made that the County could proceed under King County Code 9.04.120 - 180 to require abatement of a hazard (if indeed there were one) and require that the pipe be repaired.

In terms of real property law, if King County owned the pipe and had an easement through the private property, it could itself make the repair. However, this is hypothetical and does not comport with the facts presented. King County does not own the pipe, nor does it have an easement, so it cannot under real property law make the repairs.

In terms of drainage law, the matter is less straightforward, but it does carry with it a remedy, though this remedy would likely involve costly legal proceedings. Under drainage law, a downstream property owner may not alter the natural drainage system to the detriment of an upstream user. *See Island County v. Mackie*, 36 Wash.App. 385 (1984) at 391. A natural drain has been defined as that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands. *Id* at 388, citing *King County v. Boeing Co.*, 62 Wash.2d 545, 550 (1963). Under the facts presented, the existence and use of the pipe appears to be consistent with the natural drainage flow. However if the pipe were to become clogged and in effect frustrate the natural flow of waters, upstream property owners and users, if threatened by or actually experiencing a backwater effect, would likely have a cause of action to require the pipe owner to unclog or perhaps even remove the pipe, as the creation and use of the pipe, an "artificial" drainage

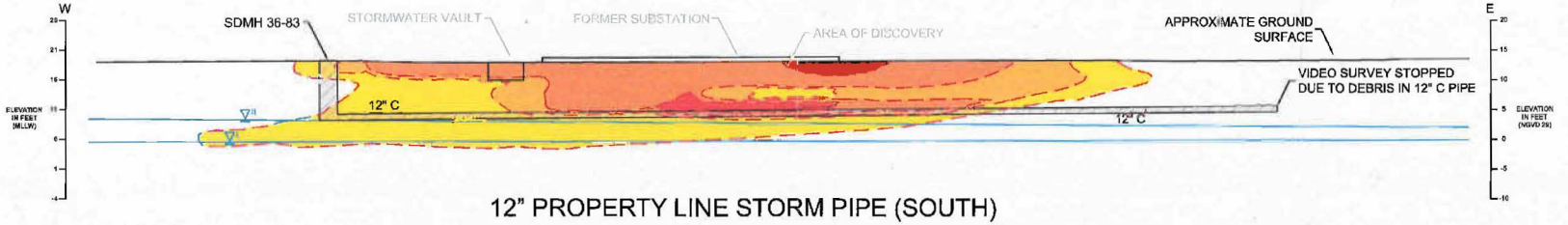
conveyance, would be viewed as carrying with it the corresponding obligation to maintain and repair it. To not do so would frustrate the functioning of the natural drainage system.

A case with a fact pattern very close to these facts, *Wilber v. Western Properties,* 14 Wash.App. 169 (1975), supports the proposition that the downstream property owner would be liable for damages for interfering with the natural drainage function. Two statements of the court in that case merit citation: "A person who so obstructs a natural drain [by placing in a drainage way a pipe incapable of carrying ordinary high flows] that damage is caused by flooding, which damage would not have resulted without the obstruction, is liable for such damage regardless of negligence." *Id* at 173. "A lower landowner who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water. If the obstruction does not accommodate that amount of flow, it has been negligently and wrongfully constructed as to the upland owner whose land becomes flooded." [citations omitted] *Id.*

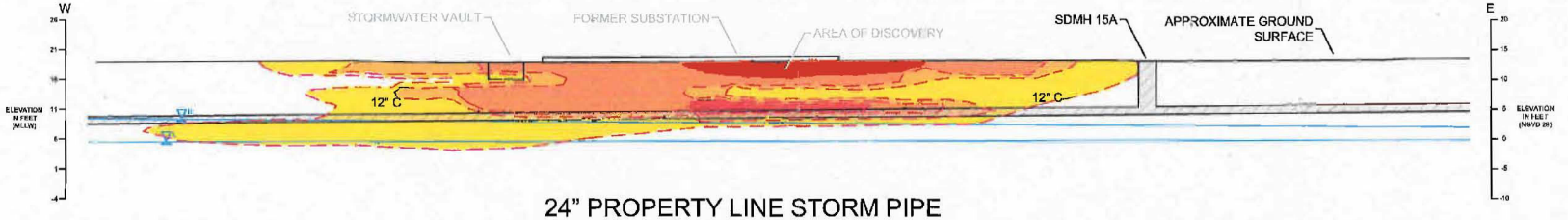
King County may not be able to claim the status of damaged property owner under the facts and holding of the *Wilber* case. However, it is my opinion that if King County could demonstrate that the functioning of its municipal stormwater system is dependent upon the downstream property owner keeping the pipe it owns functionally operating in order to comport with the natural drainage function and pattern, a court would be likely to rule in King County's favor and compel the private property owner to meet this duty under the rationale and facts of the *Wilber* decision.

The case law under drainage law offers the best avenue for King County to obtain relief on keeping the pipe open and functioning. However this remedy would require initiating court proceedings and could potentially involve considerable expense and time in obtaining the desired outcome.

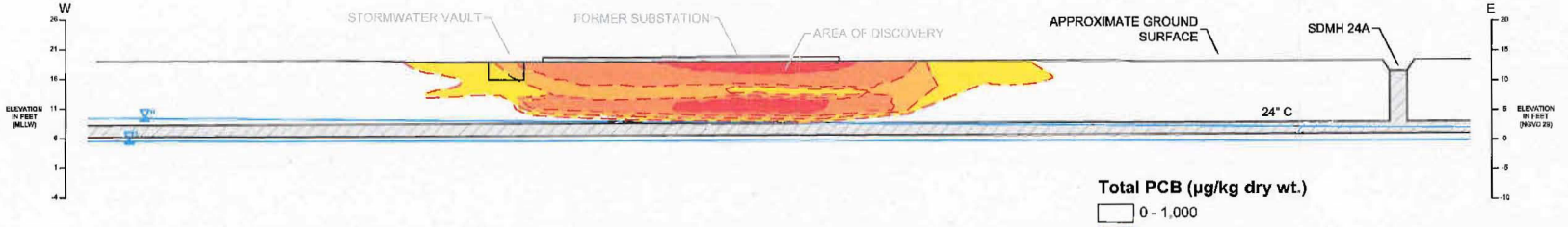
12" BOEING STORM PIPE (NORTH)



12" PROPERTY LINE STORM PIPE (SOUTH)



24" PROPERTY LINE STORM PIPE



Total PCB (µg/kg dry wt.)

- 0 - 1,000
- 1,000 - 5,000
- 5,000 - 10,000
- 10,000 - 100,000
- > 100,000

HORIZONTAL/VERTICAL SCALE (FEET):

0 10 20 40

NOTES:
1) GROUNDWATER ELEVATIONS SHOWN WERE INTERPRETED FROM MEASUREMENTS MADE DURING A 72-HOUR TRANSDUCER STUDY PERFORMED 14 THROUGH 18 MARCH 2005.
2) STORM PIPES WERE INVESTIGATED USING A VIDEO CAMERA OR SNAKE/SONDE EQUIPMENT. INVESTIGATION CONDUCTED BY WESTON IN FEBRUARY AND MAY 2005.
3) THE STORMWATER VAULT, FORMER SUBSTATION, AND AREA OF DISCOVERY ARE PROJECTED ONTO EACH PROFILE FOR REFERENCE ONLY.
4) PCB DISTRIBUTION BASED ON FIGURE 3.3.

NO.	DATE	APPR.	REVISION	NO.	DATE	APPR.	REVISION

PHASE II TRANSFORMER PCB INVESTIGATION
BOEING PLANT 2
SEATTLE, WASHINGTON

WESTON SOLUTIONS
SEATTLE WASHINGTON

CHECKED
DES. ENG.
PROJ. ENG.
PROJ. MGR.
APPROVED
APPROVED
DATE

EXPLANATION OF DRAWING SYMBOLS
C CONCRETE
▽H 72-HOUR HIGH GROUNDWATER ELEVATION
▽L 72-HOUR LOW GROUNDWATER ELEVATION
TOTAL PCBs CONCENTRATION CONTOURS (ug/kg)

FIGURE 3.8
SUBSURFACE PCB DISTRIBUTION ALONG STORM PIPE ALIGNMENTS

DRAWN	DATE	DWG. NO.	REV. NO.
KMB	JULY 29, 2005	FIGURE 3-8	0
SCALE: 1" = 20'	W.O. NO. 03709-078-001-0004 RFW NO. 05-0098	SHT. 1 OF 1	